principles of natural justice' can only mean the principles of fair play". In the present case, fair play can hardly be said to exist, when the main participant sat in the chair of the panel, and when apparently persons who could be witnesses also took part in arriving at a decision.

As to the cross-appeal by the respondent for damages, the circumstances of the case, as found by the learned trial judge, did not show that blame could not be attached to the respondent for the whole affair. By his own admission before the trial court, the respondent had all along been challenging the first appellant in his actions as chairman of the Association. I agree with the learned trial judge that appellants acted in good faith. In any case, it was not shown that the respondent suffered any loss in proprietary interest or means of livelihood as a result of being deprived of the Association's membership. Nor was it shown that his reputation was in any way affected. I would also dismiss the cross-appeal.

Chang Min Tat F.J.: On reflection, it must be apparent to all that this case has come before the High Court and before us only because the proper advice of legal advisers in matters concerning the relation between the parties was ignored.

I agree for the reasons given by Datuk Eusoffe Abdoolcader J. that the appeal be dismissed with costs.

As for the cross-appeal, in all the circumstances of the case, I would dismiss it but would make no order as to costs.

The order of the court is that the appeal be dismissed with costs and that the cross-appeal is also dismissed but there will be no order as to the costs of the cross-appeal.

Order accordingly.

Solicitors: *Cheang Lee & Ong; Chin Fook Yen & Co.*

LEE NYAN CHOI v. VOON NOON

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Syed Othman F.JJ.) November 22, 1978]

[Kuching — Federal Court Civil Appeal No. 34 of 1978]

Practice and Procedure — Application to have defence struck out — Triable issues — Power to dismiss action summarily to be resorted to only in plain and obvious cases — R.S.C. 1957, O. 19 rr. 19 & 27, O. 21 r. 1 and O. 25 r. 4.

In this case the respondent had applied to have the defence of the appellant struck out. The learned Judge at first made an order for the payment into court of the amount in dispute, but subsequently on hearing argument in open court he held he had no jurisdiction to grant conditional leave to defend. However, he held that the first six paragraphs of the defence were frivolous and vexatious and they were unnecessary or tended to prejudice, embarrass or delay the fair trial of the action. Consequently he ordered them to be struck out and entered judgment against the appellant for the sum of $37,960.11. The appellant appealed.

Held: as there were triable issues in this case the proper course would be for the issues to be tried in the usual manner in open court. The power to dismiss an action summarily without permitting a party to proceed to trial should only be resorted to in plain and obvious cases. The present case was not one of those plain and obvious cases.

Case referred to:-

(1) *Alliance (Malaya) Engineering Sdn. Bhd.* v. *Sam Development Sdn. Bhd.* [1974] 2 M.L.J. 94.

HIGH COURT.

Chan Kay Heng for the plaintiff.

J.C. Fong for the defendant.

Seah J.: On November 26, 1977 I ruled that unless the defendant paid into court the sum of $37,960.11 within 15 days from date thereof, the defence relating to this claim should be struck out and the plaintiff be at liberty to enter judgment against the sum claimed. On the application of the defendant, made within 4 days from the date of the order, I adjourned the matter into open court for further argument. The argument was heard on December 5, 1975 where both counsel for the plaintiff and the defendant had put in written submissions. At the end I reserved judgment.

It was contended by counsel for the defendant that the court was wrong to impose a condition about payment into court of the sum of $37,960.11 within a time-limit since the application was made under Order 19 rule 19 and rule 27, Order 21 rule 1 and Order 25 rule 4 of the High Court in Borneo Rules 1963. It was further argued under these Orders or rules, that the jurisdiction of the court is limited to striking out pleadings and it may order the action to be stayed or dismissed or judgment to be entered accordingly, as may be just.

Counsel for the defendant submitted that the power of the court to impose terms when leave to defend was given could only be invoked if the application was made under Order 14 (see Order 14 rule 4 and rule 6). Reliance was placed on the Federal Court case of *Alliance (Malaya) Engineering Co., Sdn. Bhd.* v. *San Development Sdn. Bhd.*[1]

For the plaintiff it was contended that the application for leave to enter judgment against the defendant was made under Order 14 as well as under Order 19 rule 19 and rule 27, Order 21 rule 1 and Order 25 rule 4, and that the court was justified to impose the term in granting conditional leave to defend on that term.

I have re-examined the summons-in-chambers dated September 14, 1977 and the notes of proceedings. I have been unable to find any indication that reliance was also placed on Order 14 of the Rules of the High Court in Borneo 1963.

Under the circumstances, I agree with the submission of counsel for the defendant that in an application under Order 19 rule 19 and rule 27, Order 21 rule 1 and Order 25 rule 4 the court has no jurisdiction to grant conditional leave to defend. Under these said Orders or rules of the High Court in Borneo, the jurisdiction of the court is confined to either striking out the pleadings and giving leave to enter judgment accordingly or dismissing the application. I agree that only in applications under Order 14 for summary judgment conditions may be imposed if the court is not satisfied with the *bona fide* of the defence, albeit the defence does raise triable issues.

I have expunged from my ruling the following sentences starting from:

"I am satisfied that the defence has raised triable issues but I am doubtful as to the bona fide of the defence relating to money paid by the plaintiff on behalf of the defendant. I therefore make an order that unless the defendant pays into court the sum of $37,960.11 within fifteen days from date hereof, the defence relating to this claim should be struck out and the plaintiff be at liberty to enter judgment against the sum claimed. Subject to this condition, the application is refused. I make no order as to the costs of this application."

I have therefore re-examined the whole matter in the light of the above exposition of the laws. In my opinion, paragraphs 1, 2, 3, 4, 5 and 6 of the defence are frivolous or vexatious and they are unnecessary or tend to prejudice, embarrass or delay the fair trial of the action and are an abuse of the process of the court. I therefore order that they be struck out and judgment be entered against the defendant for the sum of $37,960.11 with interest thereon at the rate of 5% per annum from the date of the issue of the writ and thereafter at 6% per annum on the $37,960.11 to date of payment. However, paragraphs 7, 8 and 9 of the defence are to remain. Costs in the cause to be taxed.

From the above judgment the defendant appealed to the Federal Court.

FEDERAL COURT.

J.C. Fong for the appellant.

Chan Kay Heng for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal from an interlocutory order. Respondent/plaintiff alleged that between 1974 and 1976 he had paid on behalf of appellant/defendant the total sum of $114,707.73. Out of this amount appellant had paid $76,747.62 leaving a balance of $37,960.11 for which he sued appellant. In addition, he also claimed a sum of $43,915.20 which he alleged to have lent appellant. By his defence consisting of nine paragraphs appellant denied the claims. The first six paragraphs are concerned with the $37,960.11 while the remaining three paragraphs with the money lent.

By summons-in-chambers respondent applied to have the defence struck out. On November 26, 1977 the learned judge in making an order for payment into court of $37,960.11 stated: —

"I am satisfied that the defence has raised triable issues but I am doubtful as to the bona fide of the defence relating to money paid by the plaintiff on behalf of the defendant. I therefore make an order that unless the defendant pays into court the sum of $37,960.11 within fifteen days from date hereof, the defence relating to this claim should be struck out and the plaintiff be at liberty to enter judgment against the sum claimed. Subject to this condition, the application is refused. I make no order as to the costs of this application."

On application of appellant under the four days' rule the learned judge heard further arguments. In his judgment dated February 18, 1978 the learned judge agreed that he had no jurisdiction to grant conditional leave to defend and he was wrong to order payment into court as the application was not made under Order 14 but under Order 19 rule 19 and rule 27, Order 21 rule 1 and Order 25 rule 4. He ordered the said passage to be expunged from the record. However, he held that the first six paragraphs of the defence to be frivolous and vexatious and they were unnecessary or tend to prejudice, embarrass or delay the fair trial of the action and are an abuse of the process of the court. Consequently, he ordered them to be struck out and entered judgment against defendant for the sum of $37,960.11.

Appellant submitted that the learned judge was right to say that the defence had raised triable issues but was clearly wrong to strike out part of the defence. Further, respondent also conceded that the defence did raise triable issues. In this particular case triable issues were clearly raised. A perusal of the statement of account filed by respondent shows many controversial items which could only be determined by a proper trial. As there are triable issues the proper course would be for the issues to be tried in the usual manner in open court. The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases. The present case is not one of those plain and obvious cases. Accordingly, we allowed the appeal and ordered the defence to be restored and gave the defendant unconditional leave to defend. Costs in the cause. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Reddi & Co.; Chan Kay Heng.*

MALAYSIA NATIONAL INSURANCE SDN. BHD. v. ABDUL AZIZ BIN MOHAMED DAUD

[F.C. (Raja Azlan Shah, Wan Suleiman & Syed Othman F.JJ.) November 13 & December 9, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 78 of 1976]

Road Traffic — Insurance — Person driving with expired driving licence — Whether covered by insurance policy — Construction of contract — Public policy — Road Traffic Ordinance, 1958, ss. 29 and 33.

Contract — Insurance — Person driving with expired driving licence — Whether covered by insurance policy — Construction of contract — Public Policy.

Insurance — Person driving with expired driving licence — Whether covered by insurance policy — Construction of contract.

The respondent was driving his father's car when it was involved in an accident. The policy of insurance covering the car stated that the company shall not be liable whilst the motor car was being driven by any person other than an authorised driver. The respondent and his father were named as the authorised drivers subject to the following proviso "Provided that the person driving is permitted in accordance with the licensing or other laws and regulations to drive the motor vehicle or has been so permitted, and is not disqualified by order of a court of law or by reason of any enactment or regulation in that behalf from driving the motor vehicle."

At the time of the accident the respondent had an expired driving licence but he had not been disqualified by any court for holding or obtaining a driving licence. The question arose whether the insurance policy was in force on the date of the accident. The appellants denied liability and relied on the exemption clause. The respondent argued that he was covered by the second limb of the proviso. He issued a writ to obtain a declaratory order and in the High Court Harun J. made an order that the indemnity applied to him in the circumstances of the case. The appellants appealed.